SIVANANTHAN V JAGANATHAN

v.

TEH YEE FUN & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 11-48-2003]
7 MAY 2003

CIVIL PROCEDURE: *Amendment - Defence - Propriety of affidavit in support of application to amend defence - Affidavit affirmed by solicitor having conduct of defence - Whether proper - Whether solicitor had personal knowledge of facts - Whether solicitor authorised to depose affidavit - Whether solicitor's averments merely hearsay - Whether affidavit supported by documentary exhibits - Whether affidavit supported application to amend - Nature and exercise of court's power to allow or refuse amendments to pleadings*

CIVIL PROCEDURE: *Pleadings - Amendment of defence - Application for - Propriety of affidavit in support of application to amend defence - Affidavit affirmed by solicitor having conduct of defence - Whether proper - Whether solicitor had personal knowledge of facts - Whether solicitor authorised to depose affidavit - Whether solicitor's averments merely hearsay - Whether affidavit supported by documentary exhibits - Whether affidavit supported application to amend - Nature and exercise of court's power to allow or refuse amendments to pleadings*

CIVIL PROCEDURE: *Pleadings - Alternative pleas - Whether a party may claim relief in the alternative upon setting out inconsistent sets of facts in his pleadings - Whether solicitor authorised to plead in the alternative - Whether solicitor exceeded his instructions by raising alternative plea*

CIVIL PROCEDURE: *Affidavit - Solicitor affirming affidavit on behalf of litigant - Whether proper - Principles - When may solicitor depose affidavit on behalf of litigant - Whether facts to be deposed contentious or disputed - Whether facts within solicitor's personal knowledge - Whether solicitor authorised by litigant to depose affidavit - Affidavit in support of application to amend defence*

CIVIL PROCEDURE: *Solicitor - Affirming affidavit on behalf of litigant - Whether proper - Principles - When may solicitor depose affidavit on behalf of litigant - Whether facts to be deposed contentious or disputed - Whether facts within solicitor's personal knowledge - Whether solicitor authorised by litigant to depose affidavit - Whether solicitor descending into arena of conflict*

Following a road accident involving a motorcycle ridden by the plaintiff and a motorcar driven by the 1st defendant and registered to the 2nd defendant, the plaintiff commenced an action in negligence against the defendants. By para 3 of their defence, the defendants conceded that a collision did occur between their motorcar and the plaintiff's motorcycle but asserted that it was caused solely, or contributed to, by the negligence of the plaintiff.

Subsequently and after the commencement of the trial, however, the defendants filed an application to amend their defence. The proposed amendments essentially denied that a collision had taken place between the said vehicles, claiming that the plaintiff had lost control of his motorcycle and fallen on his own. In the **alternative**, the proposed amended defence claimed that if a collision did occur, it was contributed to by the negligence of the plaintiff. The application to amend the defence was supported by an affidavit affirmed by one Mr Dasaratharaj, the defendants' solicitor having the conduct of the case. Despite the plaintiff's protestations, the magistrate allowed the defendants' application and the plaintiff appealed to the judge-in-chambers.

Held (allowing the appeal)

[1] Although a party may claim relief in the alternative upon setting out two or more inconsistent sets of material facts in his pleadings, Mr Dasaratharaj would appear to have exceeded his instructions by raising the alternative plea herein. This was because Mr Dasaratharaj had earlier averred in the affidavit in support of the application to amend the defence that the 1st defendant had informed him that the 1st defendant was not involved in the road accident. The said affidavit, however, did not disclose whether the 1st defendant had authorised Mr Dasaratharaj to plead in the alternative. The magistrate was, therefore, plainly wrong in allowing the defendants' application to amend their defence. (pp 557 h, 558 a-e & 559 c)

[2] The exercise of the power to allow or refuse an application for the amendment of a pleading at any stage of the proceedings is at the discretion of the judge. This power must always be exercised judicially, having regard to the prevailing practice and the question whether the amendment sought, if allowed, will prejudice or cause injustice to the other party which cannot be compensated by costs (bearing in mind that justice is not easily measurable in terms of money). Each application for amendment must therefore be decided on its own merits. (p 559 f-h)

[3] Contrary to his averments in the affidavit in support of the application to amend the defence, Mr Dasaratharaj could **not** have had personal knowledge of the facts concerning the accident. He was not at the scene of the accident. Furthermore, if the 1st defendant had informed Mr Dasaratharaj that the 1st defendant was not involved in the accident, then the 1st defendant, and **not** Mr Dasaratharaj, should have filed the supporting affidavit. Otherwise, Mr Dasaratharaj's averment that he had been informed by the 1st defendant that the 1st defendant was not involved in the accident was merely hearsay. Moreover, although Mr Dasaratharaj had averred that all the facts that he had deposed to in the affidavit were either within his personal knowledge or were acquired from documents within his possession, not a single document was annexed as an exhibit to the affidavit. Consequently, the affidavit did not support the application to amend the defence. (pp 557 a-c, f-g & 560 a-b)

[4] A solicitor who affirms an affidavit involving facts oversteps the bounds and limits of his office; he descends into the arena of conflict by being partisan towards the party on whose behalf he affirms the affidavit. A solicitor may only depose an affidavit on behalf of a litigant if: (i) the facts to be deposed are not contentious or disputed questions of facts; (ii) the facts to be deposed are within his personal knowledge; and (iii) he is authorised by the litigant to depose the affidavit. (pp 557 d-e & 560 e)

[Plaintiff's appeal allowed; hearing to continue before magistrate.]

Case(s) referred to:
Ashmore v. Corp of Lloyd's [1992] 2 All ER 486 ***(refd)***
Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors [1998] 2 CLJ 11 CA ***(refd)***
Bhimnath v. Jagarnath [1925] Patna 674 ***(refd)***
Chong Poh Siew v. Chong Poh Heng [1995] 1 SLR 135 ***(refd)***
Insas Bhd & Anor v. Raphael Pura [1999] 4 CLJ 784 HC ***(refd)***
Jamil Harun v. Yang Kamsiah & Anor [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 PC ***(refd)***
Malayan Banking Bhd v. Charterefield Corp Sdn Bhd [2001] 6 CLJ 407 HC ***(refd)***
Sitrac Corp Sdn Bhd v. Lim Siew Eng [2002] 4 CLJ 463 HC ***(refd)***
Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 CA ***(refd)***

Legislation referred to:
Court of Judicature Act 1964, s. 3
Subordinate Court Rules 1980, O. 49 r. 6(1)

For the appellant/plaintiff - Baljit Singh (Raman Veloo); M/s Baljit Singh & Co
For the respondent/defendant - VK Dasaratharaj; M/s VP Nathan & Partners

Reported by Gan Peng Chiang

JUDGMENT

RK Nathan J:

This short but interesting point of law arises out of a running-down action. In his statement of claim the plaintiff pleaded that on 15 November 2000 whilst he was riding his motorcycle at about 8.40 in the morning along Jalari Tanjung Tokong from the direction of Tanjung Tokong towards his place of work in the city, he was involved in an accident with a motorcar driven by the 1st defendant as the servant or agent of the 2nd defendant who owned the said motorcar and which said motorcar was proceeding from the opposite direction. The plaintiff further pleaded that suddenly and without warning the 1st defendant swerved to the right and across the plaintiff's path. The plaintiff attempted to swerve and to brake but was unsuccessful, and thus collided into the said car and sustained injuries. The plaintiff set out eighteen particulars of negligence attributed to the 1st defendant.

In their defence the defendants admitted para. 2 and 3 of the statement of claim which averred that at all material times the 1st defendant was the driver and the 2nd defendant the registered owner of the said motorcar respectively.

By para. 3 of the defence, the defendants admitted that at about the time, date and place referred to in para. 4 of the statement of claim a collision occurred between the motorcycle ridden by the plaintiff and the motorcar driven by the 1st defendant. However the defendants denied that the collision had occurred as pleaded by the plaintiff. The defendants attributed the collision solely to the negligence of the plaintiff or that the collision was contributed to by the negligence of the plaintiff. The defendants then went on to plead twenty one particulars of negligence as against the plaintiff. The defendants prayed for the action to be dismissed with costs. This defence was filed on 4 September 2001.

The Application To Amend The Defence

On 7 March 2003, after the trial had commenced, the defendants' solicitors filed an application to amend the defence. The proposed amended defence was annexed to the affidavit in support of the application to amend. By the said amendment the defendants denied the said collision. They attributed the injuries caused to the plaintiff as having occurred when the plaintiff lost control of his motorcycle and fell on his own. Alternatively, the amendment sought was that if the court found that the said motorcar was involved in the accident then the defendants sought contribution from the plaintiff and again relied on the same twenty one particulars of negligence earlier pleaded against the plaintiff.

The application to amend was supported by an affidavit affirmed by one Dasaratharaj who described himself as an advocate and solicitor having the conduct of the case. He also averred that all the facts he had deposed to were within his personal knowledge and also acquired from documents within his possession. He also averred in para. 3 of the said affidavit that he had been informed by the defendant (and I presume from the 1st defendant) that he, the defendant was not involved in the said accident.

Mr. Baljit Singh for the plaintiff objected to this amendment. However the learned Magistrate allowed the amendment. By consent parties stayed further proceedings and brought this appeal.

Findings Of The Court

This appeal from the decision of the learned Magistrate is no doubt brought pursuant to O. 49 r. 6(1) of the Subordinate Court Rules 1980 which reads as follows:

Appeal to Judge in Chambers (O. 49 r. 6)

(1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.

In *Sitrac Corp Sdn Bhd v. Lim Siew Eng* [2002] 4 CLJ 463 Abdul Aziz J (as he then was) held that a ruling made in the course of the hearing of an application must be a ruling on some point other than the ultimate question of whether the application is to be allowed or dismissed. The right to appeal from a particular decision can only be denied by clear words. Whether a decision is a ruling that is excluded by the excluding clause in the definition of 'decision' in s. 3 of the Court of Judicature Act 1964 is a question of statutory interpretation of that clause. It is an incorrect approach to the interpretation of that clause to begin by asking the question whether the decision is a final order or an interlocutory order because the term 'final order' or 'interlocutory order' is not used in the excluding clause.

I agree and adopt the view held in *Sitrac Corp Sdn Bhd*. In fact this view was long ago accepted by the Court of Appeal in *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377.

Referring to para. 18/7/8 of the *Supreme Court Practice* (Malaysian Edition 1996) Mr. Dasaratharaj argued that "either party may in a proper case include in his pleading two or more inconsistent sets of material facts and claim relief there under in the alternative."

Whilst this may be so I prefer to accept the view of Mullick J in *Bhimnath v. Jagarnath* [1925] Patna 674 where his Lordship said at p. 675 as follows:

> Although the Judicature Act in England has widened the rules of pleading and now enables parties to claim relief in the alternative upon setting out inconsistent facts, the trend of judicial decisions in India seems to limit the scope of the Code and to forbid a plaintiff, certainly where the facts are presumably within his knowledge, to plead inconsistent facts and to require him to elect, so that the defendant may know what cause he has to meet; and similarly a defendant may not plead inconsistent facts unless he is a stranger to the transaction and the true state of facts is not within his personal knowledge.

Personal Knowledge

We now come to the question of 'personal knowledge' of the facts. The deponent to the supporting affidavit is the lawyer having conduct of this case. He had averred that he had personal knowledge of the facts leading to the need to amend. Unless he was travelling in the car with the 1st defendant or was a passer-by and thus witnessed the accident, he could not be said to have personal knowledge. Therefore his averment that he had personal knowledge is not correct. In fact in para. 3 of the said affidavit he had averred that he had been informed by the defendant but he did not state if it was the 1st defendant who had informed him that he, the 1st defendant was not involved in the accident. The question that needs to be asked is, if the solicitor was actually informed by the 1st defendant, then why did he not require the 1st defendant to file the supporting affidavit.

To my mind a solicitor who affirms an affidavit involving facts is over-stepping the bounds and limits of his office. In this particular case if the plaintiff had filed an application to cross-examine Dasaratharaj on his affidavit, counsel would have unnecessarily put himself in difficult situations. Firstly the basic bulwark of solicitor/client relationship that protects communication between solicitors and clients itself would become an issue. If an advocate affirms factual affidavits he would be descending into the arena of conflict by being partisan towards the party on whose behalf he is affirming the affidavit. And in that case the other side is clearly entitled to cross-examine him to show his partisanship. He would then have to disqualify himself from having further conduct of the case.

It is my judgment that by affirming a sworn affidavit that he had factual knowledge of the facts leading to the need to amend, the deponent to the supporting affidavit, had indeed descended into the arena of conflict and had exposed himself to being questioned on his factual knowledge.

But that is not the end of the matter. Since the defendant, whether the 1st or the 2nd, who told the said solicitor that the 1st defendant was not involved in the said accident had himself not affirmed an affidavit, I hold that the supporting affidavit filed by Dasaratharaj that he was told that the 1st defendant was not involved in the accident, is based on hearsay evidence and thus the affidavit does not support the application.

Coming to the case of *Bhimnath*, whilst I am not prepared to hold the view that once a defendant had denied the collision, he is not entitled to plead in the alternative that if the court finds his involvement, then the court ought to see if there was contribution based on the conduct of the plaintiff

throughout the moments leading to the accident, yet in this particular case, where the same counsel who has had the conduct of the case had averred that he was told by the 1st defendant that he was not at all involved in the accident then and in such an event by raising an alternative plea, counsel is deemed to have exceeded his instructions since the affidavit did not disclose that the 1st defendant had authorised him to plead in the alternative, in the event the court found his involvement true. That is why I had emphasised earlier that it would have been prudent to have the 1st or 2nd defendant to affirm an affidavit to that effect.

Solicitors must realise that theirs is an onerous job filled with enticements and entrapments. Lawyers must know that whilst on the one hand there will be the desire to protect and preserve the continuing relationship of a long standing solicitor/client commitment, yet on the other hand such a relationship can cloud the solicitors true perception of the case by a refusal to see the rays of truth that had been pervading the case.

I must add that a litigant who avails himself of the right to press inconsistent views before the court and endeavours to establish both the alternatives by relying on hearsay evidence of his solicitor, or by refusing himself to affirm an affidavit to the truth of the matters stated by his solicitor, is plainly in my view placing himself in peril and might find himself entangled in inextricable difficulty because evidence adduced in two absolutely inconsistent situations which are mutually destructive, can hardly be expected to secure confidence.

At this point it is pertinent to refer to the view of Lord Templeman in *Ashmore v. Corp of Lloyd's* [1992] 2 All ER 486 at 493 (a judge worthy of the greatest respect before whom I had the opportunity of arguing the case of *Jamil bin Harun v. Yang Kamsiah & Anor* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 PC.) This is what his Lordship said:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a

> tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Financiers de la Cite SA v. Westgate Insurance Co Ltd* [1990] 2 All ER 947 at 959, [1991] 2 AC 249 at 280-281 I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceeding and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong.

In this case I have no doubt in concluding that the learned Magistrate who allowed the application to amend, was plainly wrong.

In *Chong Poh Siew v. Chong Poh Heng* [1995] 1 SLR 135 Rubin J, in considering a similar issue said at p. 151 as follows:

> It should be presently observed that the substance of this alternative plea is contrary to the original claim of the plaintiff that he is not only the legal owner but also the beneficial owner of the disputed share. Given the conflicting nature of the interests, I am of the opinion that this alternative plea is simply not available to the plaintiff. It is settled law that a plaintiff may rely on several different rights alternatively though they may be inconsistent (per Bret LJ in *Philipps v. Philipps & Ors* at p. 134). However, as stated by Devlin J in *Heskell v. Continental Express* at p. 1044: [a] man cannot in one breath invoke both the truth and an estoppel; he must make his choice. He cannot, in presenting a case against a defendant mix fact and fiction in the proportions which suit him best.

It is also pertinent to refer to the views of our Court of Appeal on the right to allow to amend. In *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [1998] 2 CLJ 11 the Court of Appeal held that the exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed, would cause injustice or prejudice to the other party which cannot be compensated by costs, bearing in mind that it is not always easy to measure justice in terms of money. Each application must therefore be decided on its own merit.

There is now another issue that I must consider. Counsel who affirmed the affidavit in support averred that he relied on certain documents in addition to his personal knowledge. Since I have already dealt in depth with the question of personal knowledge it is now necessary for me to consider what documents if any the defendants are relying on. To my amazement I realised that the defendants had not annexed a single document as an exhibit to the affidavit in support, affirmed by their counsel. There is therefore absolutely no basis on which this court could rely on the deponent's affidavit in support of the application to amend. In respect of non-disclosure of documents referred to in an affidavit this is what I had said in *Insas Berhad & Anor v. Raphael Pura* [1999] 4 CLJ 784 at p. 802:

> Assuming this is true, ie, that some documents were kept overseas, what were they. This court must be shown the documents and they must be identified to satisfy the court that the contention of the defendant that it is unsafe to keep these documents in this country is true. No such affidavit evidence has been led. Mr. Raphael Pura's allegation that it is not safe to keep documents in this country is a very serious accusation that must be met with the clearest evidence from him. Otherwise it could lead to a suggestion of *mala fide* on the part of the defendant.

In this context I accept and adopt the views of Ramli Ali JC (as he then was) in *Malayan Banking Bhd v. Charterefield Corp Sdn Bhd* [2001] 6 CLJ 407 wherein he held that a solicitor may depose an affidavit on behalf of the litigant if the following conditions are fulfilled: (i) the facts to be deposed must not be contentious or disputed question of facts; (ii) the facts to be deposed must be from his knowledge; and (iii) he is authorised by the litigant to depose the affidavit.

Having considered the submissions and all authorities submitted by both parties I allowed the appeal and by consent of both parties made no order as to costs since it had been agreed by both parties that this issue be decided by this court without an order as to costs. I also ordered that the same Magistrate do continue to hear the case.